

No. 2923

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MARIAM A. PATTERSON and
H. J. PATTERSON,

Appellants,

vs.

EDWARD STROECKER, as Trustee of
the Estate of H. J. Patterson,
a Bankrupt,

Appellee.

REPLY BRIEF FOR APPELLANTS.

A. R. HEILIG,
THOMAS R. WHITE,
Attorneys for Appellants.

Filed

AUG - 1 1917

Filed this.....day of July, 1917. **D. Monckton**
Clerk

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2923

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

MARIAM A. PATTERSON and

H. J. PATTERSON,

Appellants,

vs.

EDWARD STROECKER, as Trustee of
the Estate of H. J. Patterson,
a Bankrupt,

Appellee.

REPLY BRIEF FOR APPELLANTS.

(All italics ours.)

We take issue with counsel for appellee on the first proposition advanced in their brief.

The question here is not as to what the deed from Patterson to his wife conveyed to her. She did not acquire her rights in the land by virtue of this deed. The deed was dated November 27, 1911. She had been the sole equitable owner of the land since September 19, 1910 (Finding 13, Tr. 41) and long before Patterson had had any dealings with Ham-

ilton. As between herself and Patterson and Patterson's creditors she needed no deed.

There are two questions for decision here: (1) What right did the ownership of a quarter interest in the mine give Mrs. Patterson in the royalty on the output of the mine? (2) What did Hamilton agree to pay the additional 5 per cent royalty for?

I.

The former decision of this court does not control this appeal. The case was sent back to the trial court for a trial *de novo* and is now here upon a new and different record.

The issue on the first trial was simply as to the bona fides of the deed from Patterson to his wife. The trial court had decided that the deed had been given in good faith and carried with it the 5 per cent royalty, and that by virtue of this deed alone Mrs. Patterson acquired her rights to the 5 per cent. On the second trial the claim of Mrs. Patterson to this royalty is not based alone upon the rights conveyed by this deed but upon the rights held by her as the owner of the quarter interest in the land from a time long prior to the making of any of the leases; and upon the understanding and agreement of Hamilton and Patterson as testified to by Patterson (Tr. 120 et seq. and Tr. 141) and Mrs. Patterson (Tr. 152, 159).

When the case was here before this court decided: (1) That it was error for the lower court to dismiss the suit at the close of plaintiff's evidence without requiring the defendants to make a showing as to the good faith of the conveyance from Patterson to his wife. (2) That the deed from Patterson to his wife of one-quarter of the mine did not entitle her to *all* of the royalties reserved to Patterson by the terms of the sublease.

In its decision on the former appeal (220 Fed. 25) this court said:

"That deed did not purport to convey to the defendant, Mariam A. Patterson any part of her husband's interest in the amount then due or afterwards to become due to him from Hamilton under the lease by which the latter worked the ground, and certainly did not convey to her any part of the 5 per cent of the gross mineral output which was derived from the undivided three-fourths of the claim owned by Wickersham."

This court then looked at the case as though Patterson had owned the quarter interest in the claim until he made the deed to his wife and that her rights were to be measured by the terms of the deed and as being initiated at the date of the deed. The first section of the syllabus of that opinion (220 Fed. 21) reads:

"Where the owner of an undivided interest in a mining claim, who had leased the entire claim from his co-owner under a lease providing that he should possess and work the entire claim, including his interest, under the terms of the lease, sublet the claim to another, reserving a

percentage of the gross output, and *thereafter* conveyed his undivided interest to his wife, the wife did not thereby become entitled to *all* of the royalties reserved in the sublease, as against the trustee in bankruptcy of her husband's estate",

whereas from the record on this appeal it appears that Mrs. Patterson owned the quarter interest during all of the period covered by any of the transactions involved here, and long prior to the date of the deed. She became the owner of the quarter interest September 19, 1910, according to the finding of the lower court (Tr. 41). The lease from Wickersham to Patterson is dated October 12, 1911 (Tr. 39). The sublease from Patterson to Hamilton November 27, 1911 (Tr. 39) and the deed from Patterson to his wife November 27, 1911 (Tr. 100), more than a year after she had become the real owner of the property.

We understand from the decision of this court on the former appeal that it was the opinion of the court at that time, that if the deed was made in good faith, and if the deed initiated the rights of Mrs. Patterson in the premises, Mrs. Patterson would be entitled to at least a one-fourth interest in the 5 per cent royalty to be paid by Hamilton. This understanding arises from the language used on pages 25 and 26 of the reported decision hereinbefore quoted. In other words, her rights based solely upon the deed would entitle her to a quarter interest in the royalty impounded. If the former decision of the court is now the law of this case, we assume that

the lower court erred on the last trial in awarding *all* of the royalty money impounded to appellee, for, in any event, at least one-fourth of it belongs to Mrs. Patterson.

But the testimony adduced at the last trial was not the same as at the former. As is pointed out on page 13 of appellee's brief, there was introduced additional documentary evidence, and the testimony of Mrs. Patterson corroborating her husband not only as to the *bona fides* of the deed but as to the consideration for the lease on Mrs. Patterson's quarter interest. Their testimony was that all of the 5 per cent to be paid by Hamilton under the sublease agreement was to be paid on account of the quarter interest of Mrs. Patterson. There was no other testimony on the subject. Nor does it seem to us that there is any inconsistency between this testimony and the written agreements. The lease from Wickersham to Patterson (Tr. 56) provided that Wickersham was to receive 25 per cent of the gross output as royalty for working his *three-quarters* interest. This royalty was afterwards reduced to 20 per cent of the gross (Tr. 146). True, this lease provided that it covered the whole claim, but this was only to protect Wickersham in the collection of his royalty and against liens on the property. Wickersham could not give Patterson a lease on the quarter interest, nor could Patterson himself. The broad language of the lease was merely to protect Wickersham. It was a bond exacted by Wickersham to secure faithful performance of the requirements of

the lessee to him. When Patterson sold out to Hamilton what would be more natural than for Patterson to require Hamilton to meet the obligations of the lease from Wickersham and to pay Patterson additional royalty on account of the quarter interest, thus conveying to Hamilton the Wickersham lease for nothing except the assumption of its obligations, but requiring a royalty of 5 per cent on account of the lease on the quarter interest. Such were the details of the arrangement according to the testimony of Patterson and his wife. There was no evidence to the contrary. Under such an arrangement the royalty to be paid by Hamilton on the quarter interest would be at a less rate than on the three-quarters. He would be paying 20 per cent for the three-quarters and only 5 per cent for the one-quarter.

The sublease agreement between Patterson and Hamilton throws no light on the question as to what the 5 per cent royalty was paid for. Whether it was the consideration for the lease on the whole claim or only on the one-quarter interest does not appear from that agreement (Tr. 72).

II.

As to appellee's second point it seems to us to be a sufficient answer to it to say that Wickersham is not here objecting to the deed to Mrs. Patterson or the assignment to Hamilton, but according to the

testimony expressly consented to both the deed (Tr. 98) and the assignment (Tr. 146).

III.

On the third point made that the "bare legal title" of the quarter interest was conveyed to Mrs. Patterson we think we have sufficiently burdened the court in our argument to the effect that Mrs. Patterson at all times herein involved was the real owner of the quarter interest and the deed given as between her and Patterson did convey but the "bare legal title". In this matter we rely upon the finding of the lower court (Tr. 41) to the effect that Mariam A. Patterson was from the 19th day of September, 1910, the equitable owner of the quarter interest; and the testimony in the record in support thereof. This finding it seems to us forecloses all consideration here as to the ownership of this quarter interest, and as to the time when Mrs. Patterson acquired the ownership.

Dated, San Francisco,
July 30, 1917.

Respectfully submitted,
A. R. HEILIG,
THOMAS R. WHITE,
Attorneys for Appellants.

